

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Section 230 of the Communications Act ) RM-11862  
 )  
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To: The Commission

**COMMENTS BY NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE AND  
RANKING DIGITAL RIGHTS URGING DENIAL OF THE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION’S PETITION  
FOR RULEMAKING**

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**Introduction**

New America’s Open Technology Institute (OTI) and Ranking Digital Rights (RDR) appreciate the opportunity to submit a statement in response to the Petition for Rulemaking of the National Telecommunications and Information Administration (NTIA). OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technologies that are open and secure, and their benefits. RDR works to promote freedom of expression and privacy on the internet by creating global standards and incentives for companies to respect and protect users’ rights. We support and defend the right to privacy and freedom of expression, and press internet platforms to provide greater transparency and accountability around their operations, technologies, and impacts. For the reasons outlined below, we urge the Commission to deny the petition on the grounds that the petition does not warrant consideration and the Commission should not proceed further in the rulemaking process.<sup>1</sup>

We support many of the statements in NTIA’s petition regarding the importance of safeguarding free expression online, including where it states, “Only in a society that protects free expression can citizens criticize their leaders without fear, check their excesses, and expose their abuses.”<sup>2</sup> Further, we agree with the NTIA that “times have changed”<sup>3</sup> since the passage of Section 230 of the Communications Decency Act of 1996, and the internet ecosystem now reflects a diversity of opinions across a myriad of online platforms. However,

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<sup>1</sup> 47 C.F.R. § 1.401(e) (2007)

<sup>2</sup> Petition for Rulemaking, RM-11862 (filed July 27, 2020) (“NTIA Rulemaking Petition”), [https://www.ntia.gov/files/ntia/publications/ntia\\_petition\\_for\\_rulemaking\\_7.27.20.pdf](https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf).

<sup>3</sup> *Id.*

any further consideration of NTIA's petition would improperly broaden the statutory authority of the Commission, violate the First Amendment, and chill the free speech of users online. The NTIA's petition seeks to censor, not protect, the freedom of expression of users. To ensure that our governing institutions maintain their proper and constitutionally valid roles in our democratic system, the Commission should deny this petition.

**I. The Commission lacks statutory authority to promulgate a Section 230 rulemaking.**

**A. NTIA's assertion that social media platforms are information services subject to FCC rulemaking is incorrect and inconsistent with FCC precedent.**

The Commission should deny the NTIA petition because it is inconsistent with the Title I authority over information services<sup>4</sup> and contradicts previous Commission statements on Section 230. The Commission has never interpreted Section 230 as a grant of rulemaking authority and has repeatedly asserted the opposite position, both in litigation and in agency orders. The NTIA petition's classification of social media platforms as information services is incorrect, and the claims the petition makes about the Commission's authority to regulate social media are inaccurate and inconsistent with Commission precedent.

The NTIA's claim that the definition of "interactive computer services" in Section 230(f)(2) classifies such services as "information services" is in direct conflict with the text of the statute, which actually says the opposite. The statutory definition includes "information service" in a list with "system" and "access software provider" as types of services that can be "interactive computer services" if they satisfy the rest of the definition.<sup>5</sup> Therefore, information services can also be interactive computer services, but it does not follow that all interactive computer services are always information services. The Commission declined to classify edge providers, including social media, as "information services" in the Restoring Internet Freedom Order.

Moreover, in the Restoring Internet Freedom Order, the Commission repeatedly asserted that Section 230 could not provide the basis for rulemaking. The Commission reclassified broadband Internet access service as an information service rather than a telecommunications service to justify a deregulatory policy, interpreting the 1996 act to confirm "Congress's approval of our preemptive federal policy of nonregulation for information services."<sup>6</sup> And the Commission agreed with the D.C. Circuit opinion stating that section 230(b)

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<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-163).

<sup>5</sup> 47 USC § 230(f)(2). "The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

<sup>6</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 at 122 (2017).

is a “statement [] of policy that [itself] delegate[s] no regulatory authority.”<sup>7</sup> The Commission has abdicated its authority on net neutrality by reclassifying broadband Internet access service under Title I information service, therefore to claim regulatory authority now over information services is inconsistent with agency precedent.

## **B. Congressional silence does not grant the Commission rulemaking authority.**

The Commission should deny NTIA’s petition because Congress has not delegated authority to the Commission to promulgate regulations on Section 230. NTIA claims that Congress’s silence on the issue implies delegated authority, but this argument is not supported and is, in fact, contradicted by case law.<sup>8</sup> OTI and RDR agree with Commissioner Starks that “NTIA has not made the case that Congress gave the FCC any role here.”<sup>9</sup>

NTIA claims that the Commission has appropriate authority to promulgate rules related to Section 230 because Congress failed to explicitly say that it did not have authority to do so.<sup>10</sup> NTIA assumes that Congress must explicitly state when it has not delegated authority to the Commission, and concludes that because “Congress did not do so ...[it] opens an ambiguity in section 230 that the Commission may fill pursuant to its section 201(b) rulemaking authority.”<sup>11</sup> The petition ignores the body of case law that consistently rejects this argument.

The D.C. Circuit has rejected earlier attempts by the Commission to derive implied authority from Congressional silence.<sup>12</sup> In *MPAA v. FCC*, the question was whether, in addition to its statutory mandate to issue closed captioning regulations, the Commission had been delegated authority by Congress “to promulgate visual description regulations.”<sup>13</sup> The Court rejected the Commission’s argument that “the adoption of rules ... is permissible because Congress did not expressly foreclose the possibility,” calling it “an entirely untenable position.”<sup>14</sup> The D.C. Circuit held that Congress could have decided to provide the Commission with authority to adopt rules and that the statute’s “silence surely cannot be read as ambiguity

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<sup>7</sup> *Id.* at 171.

<sup>8</sup> See, e.g., *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.), amended, 38 F.3d 1224 (D.C. Cir. 1994) (“Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”) (emphasis in original); see also *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) (“We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power.”).

<sup>9</sup> William Davenport, *COMMISSIONER STARKS STATEMENT ON NTIA’S SECTION 230 PETITION*, Federal Communications Commission (July 27, 2020), <https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf>.

<sup>10</sup> NTIA Rulemaking Petition at 17 (“[n]either section 230’s text, nor any speck of legislative history, suggests any congressional intent to preclude . . . the presumption that the Commission has power to issue regulations under section 230.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796 (D.C. Cir. 2002).

<sup>13</sup> *Id.* at 801.

<sup>14</sup> *Id.* at 805.

resulting in delegated authority to the FCC to promulgate the disputed regulations."<sup>15</sup> Likewise, in *ALA v. FCC*, the Court rejected the Commission's broadcast flag regulations because they had "no apparent statutory foundation and, thus, appear[ed] to be ancillary to nothing."<sup>16</sup>

Congressional silence on the FCC's authority is a reflection of the nature of Section 230. The statute is self-executing because it is a grant of immunity from civil liability that is enforced through private litigation. Congress did not mention the Commission in Section 230 because, unlike other statutes the Commission enforces, implements, and oversees, it does not require agency action to implement or enforce. The Commission has never had a role in implementing or enforcing Section 230, and it would be inaccurate to use Congressional silence to read one into the statute now.

## **II. NTIA's draft regulation language seeks to create content-based regulation that poses grave threats to First Amendment protections.**

NTIA's goal of having federal regulations dictate what type of content interactive computer services can host or remove to benefit from Section 230's liability shield would amount to content-based regulation that likely violates the First Amendment. As the Court has said, "Content-based laws -- those that target speech based on its communicative content -- are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."<sup>17</sup>

NTIA, through its proposed regulations, attempts to protect a certain type of content from being removed by interactive computer services. Specifically, the proposed regulations remove an interactive computer service's classification as a publisher when it "restricts access or availability" of content. This classification is a core part of the Section 230 liability shield<sup>18</sup> and removing this shield for certain actions would push services to avoid removing content, including posts that violate their own terms of services. In essence, NTIA's proposal would prescribe the limited conditions for when a service can benefit from a liability shield and when it can be subject to liability for its decisions concerning user-generated content. By attempting to dictate when liability attaches to a certain type of content moderation action by platforms, the proposed regulation amounts to content-based restrictions that run afoul of the First Amendment.<sup>19</sup> Even if the NTIA or the Commission are able to establish a compelling state interest, such content-based regulations will likely be found unconstitutional since the path to regulating speech here is not narrowly-tailored.

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<sup>15</sup> *Id.* at 806.

<sup>16</sup> *Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 703 (D.C. Cir. 2005).

<sup>17</sup> *Reed v. Town of Gilbert, Ariz.* 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015).

<sup>18</sup> *Domen v. Vimeo* 433 F. Supp 3d 592, 601 (S.D.N.Y. 2020).

<sup>19</sup> *Matal v. Tam* 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017) "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

### III. The Commission's rulemaking would chill free speech of internet users.

While NTIA's petition purports to advance the cause of freedom of expression for American internet users, if the Commission accepts the petition for rulemaking this would instead chill user speech by enabling the targeted harassment of members of protected classes, by disincentivizing platforms from moderating most types of user content, and by raising the specter of government surveillance, censorship, and reprisal.

NTIA contends that social media platforms moderate user speech in a manner that is "selective censorship."<sup>20</sup> Many of the anecdotes put forth as evidence of ideological bias concern the removal either of user speech that threatens, harasses, or intimidates other users on the basis of their membership in a protected class, or of factually incorrect information about the voting process among other topics.<sup>21</sup> The first type of speech is intended to, and frequently has the effect of, driving members of protected classes away from the social media "public square" and chilling their speech, while the second is intended to dissuade Americans from exercising their constitutionally protected right to vote. The NTIA's petition appears to be designed to prevent social media platforms from moderating such objectionable content. But this would have the effect of first, disproportionately chilling the speech of members of protected classes in service of enabling other speakers to engage in threatening, harassing, and intimidating speech, and second, of reducing voter participation by sowing doubts about the legality of absentee ballots distributed through the mail.

NTIA's petition urges adoption of rules that would enable harassment and deliberate disinformation -- two types of content that many platforms currently prohibit -- and diminish the voices of members of protected classes. First, the petition urges the FCC to clarify that "section 230(c)(1) applies to liability directly stemming from the information provided by third-party users" and that it "does not immunize a platforms' own speech, its own editorial decisions or comments, or its decisions to restrict access to content or its bar user from a platform."<sup>22</sup> In other words, under NTIA's proposal, interactive computer services would be open to lawsuits when they remove a user's speech for running afoul of the company's terms of service, or when they append a "fact check" or other supplementary information to a user's original post. These rules would create an incentive for platforms to avoid enforcing their rules against users they believe are likely to file suit, regardless of the underlying merits of such litigation. This is precisely the scenario that Section 230 was enacted to avoid.

Second, the petition urges the FCC to redefine "otherwise objectionable" in section 230(3)(b) in a way that strictly limits the content that platforms can moderate without risking litigation. Specifically, NTIA wants the meaning of "otherwise objectionable" to be limited to "obscene, lewd, lascivious, filthy, excessively violent, or harassing materials." This proposed definition would disincentive platforms from removing harmful content that the original drafters of Section 230 in 1996 could never have foreseen, content that was originally covered by the

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<sup>20</sup> NTIA Rulemaking Petition at 7.

<sup>21</sup> NTIA Rulemaking Petition at 25, 43-44.

<sup>22</sup> NTIA Rulemaking Petition at 30.

current category of “otherwise objectionable.” NTIA seeks to remove the immunity shield that applies whenever platforms take down or fact-check misinformation and disinformation around voting or Census participation, as well as racist comments that are not deemed to rise to the level of “harassing” an individual. As a result, individuals who belong to a protected class would have their voices in the digital space diminished because services fear that removing or fact-checking such negative material will open them to lawsuits.

Third, conditioning Section 230 immunity on a service’s ability to demonstrate that a content moderation action meets the standard set by the proposed definition of “good faith” would incentivize companies to refrain from moderating user content in order to avoid burdensome litigation. Most concerning, the proposed standard would require companies to achieve perfect consistency in the enforcement of their content rules against “similarly situated” material.<sup>23</sup> This bar would be extremely difficult, if not impossible, to achieve at a global scale and proving compliance with this metric in litigation would be very costly. Again, this is precisely the scenario that Section 230 was intended to avoid, and it would be inappropriate for the FCC to circumvent the will of Congress by engaging in the rulemaking urged by the NTIA petition.

More generally, even the perception of governmental monitoring and regulation of citizen speech has demonstrated chilling effects. A 2016 study found that simply being aware of government monitoring “significantly reduced the likelihood of speaking out in hostile opinion climates.”<sup>24</sup> Similarly, a 2017 study confirmed not only that various types of government intervention causes chilling effects, but also “that younger people and women are more likely to be chilled; younger people and women are less likely to take steps to resist regulatory actions and defend themselves; and anti-cyberbullying laws may have a salutary impact on women’s willingness to share content online suggesting, contrary to critics, that such laws may lead to more speech and sharing, than less.”<sup>25</sup>

#### **IV. Conclusion**

The Commission should cease to go any further in considering this petition. If Congress wanted to delegate authority to the FCC to make rules defining Section 230, it could do so. Instead, Congress wrote 230 in a way that has been implemented and enforced for decades without the involvement of the FCC. Section 230 is a self-executing statute because it is a grant of immunity from civil liability that is enforced through private litigation. The FCC has never had a role in implementing or enforcing Section 230, and it would be inaccurate to read one into the statute now. Further, NTIA’s proposal would violate the First Amendment by imposing a content-based regulation that picks and chooses what type of content provides interactive computer services with an immunity shield and what type of editorial discretion opens them up to liability. Finally, by disincentivizing social media platforms from removing harmful content that threatens

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<sup>23</sup> NTIA Rulemaking Petition at 39.

<sup>24</sup> Elizabeth Stoycheff, *Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, 93 *J.ism & Mass Comm. Q.* (2016).

<sup>25</sup> Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 *Internet Pol’y Rev.* (2017).

or negatively impacts marginalized communities, NTIA’s proposal would chill the speech of those who are members of a protected class.

Therefore, OTI and RDR urge the Commission to deny NTIA’s petition. For the reasons outlined in these comments, the Commission has no reason to move forward with the petition or seek public comment on this matter.

Respectfully submitted,

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